No. 94-1507

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

vs.

MARO LEATHER CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

—v.—

MARO LEATHER CO.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Respondent, in opposing the petition for a writ of certiorari, argues that petitioner should have made a fourth request to the New York courts for review of the Appellate Term decision here complained of; however, prior decisions of this Court have held such a requirement to be unreasonable and thus not a jurisdictional requisite under 28 U.S.C. § 1257 (1988). The balance of respondent's arguments either misstate or ignore the relevant precedents. The writ of certiorari should be granted.

CONSTITUTIONAL PROVISIONS INVOLVED BUT NOT PREVIOUSLY QUOTED IN FULL

Article 6, section 3 of the Constitution of the State of New York (McKinney 1987) provides:

§ 3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decisions of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon ap-

plication (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or other entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the Untied States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

(9) The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

THE WRIT SHOULD BE GRANTED

I. This Court's *Gotthilf* Decision Is No Bar to Certiorari Jurisdiction

Respondent argues that the instant petition should be dismissed upon the sole authority of *Gotthilf v. Sills*, 375 U.S. 79, 84 S. Ct. 187, 11 L. Ed. 2d 159 (1963). In that case, over the dissent of Chief Justice Warren and Justices Douglas and Black, this Court adopted a New York Court of Appeals finding of nonfinality in dismissing an appeal to it from an order granting body execution against petitioner Gotthilf, holding that failure to apply for Appellate Division permission to appeal the constitutional question to the Court of Appeals prevented a possible decision of "the highest court of a State in which a decision could be had" under the then version of 28 U.S.C. § 1257 (1988).

Gotthilf is clearly distinguishable from the instant case. Here there is present a constitutional question—the enforcement of state prejudgment interest rules over a treaty limitation under the Supremacy Clause—and this Court is not bound by the Court of Appeals' finding that a construction of the federal Constitution was not "directly involved" (N.Y. CONST. art. 6, § 3(b)(1)). Moreover, the dissent in *Gotthilf* pointed out that in that case there was

> no suggestion that after the Court of Appeals dismissed the appeal, petitioner should have repaired once more to the Appellate Division for a certificate or in the words of Section 592, 5 (c) of the New York Civil Practice Act "for permission to appeal."

375 U.S. at 83 n., 84 S. Ct. at 189, 11 L. Ed. 2d at 161. But that is the very suggestion now made by respondent in the present case.

While it is true that CPLR § 5602(b)(2)(i) theoretically provides for the Appellate Division's granting of permission

to appeal to the Court of Appeals, in the circumstances of this case, and under the established interpretation by this Court of the requirements of 28 U.S.C. § 1257, such a futile motion is not required.

A brief review of the appellate history of the instant case is called for. The decision now sought to be reviewed was issued by the New York Supreme Court, Appellate Term, First Department, on July 19, 1994 (Appendix to Petition, A-1). Petitioner's timely August 8, 1994 motion to Appellate Term for reargument or permission to appeal to the Appellate Division was denied on October 13, 1994 (A-14). That was the first refusal of appellate review. Then petitioner's timely October 20, 1994 motion to the Appellate Division for permission to appeal from the Appellate Term decision was denied on December 13, 1994 (A-15). That was the second refusal.

Petitioner then timely filed a December 19, 1994 Notice of Appeal as of right to the Court of Appeals on the constitutional ground established in N.Y. CONST. art. 6, § 3(b)(1) (A-16). The Court of Appeals has the power to review appeals *sua sponte* for jurisdiction and in connection with such review on January 3, 1995 the clerk of the court invited comment from the parties (Appendix M, A-40). Petitioner filed a letter-submission on January 10 (Appendix N, A-42), to which respondent answered (Appendix O, A-49) and petitioner replied (Appendix P, A-52). Respondent also made a submission (Appendix Q, A-54) to which petitioner responded (Appendix R, A-58). In this last letter-submission, petitioner alternatively requested (A-60) that if the Court of Appeals were to find itself to lack jurisdiction on the appeal as of right, it should grant leave to appeal under the "interest of substantial justice" standard of N.Y. CONST. art. 6, § 3(b)(6)(b). This the Court in its eventual order (A-18) failed to do. This, then, was the third refusal.

Respondent claims that petitioner should thereafter have sought leave from the Appellate Division to appeal to the Court of Appeals from its own order denying leave to ap-

peal from the same Appellate Term decision.[1] But the standard for any such discretionary leave to appeal is the same as that involved on the three prior refusals of appellate review. *Compare* N.Y. CONST. art. 6, § 3(b)(6) ("Such an appeal shall be allowed when required in the interest of substantial justice.") *with Rosenberg v. Rosenberg*, 24 A.D.2d 26, 27, 263 N.Y.S.2d 586, 588 (1st Dep't 1965) ("[T]he paramount consideration [is] whether the interests of justice call for our review of the particular case.").

Under such circumstances, 28 U.S.C. § 1257 does not require that a further application be made in order for this Court to retain certiorari jurisdiction. In *Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Rock*, 279 U.S. 410, 49 S. Ct. 363, 73 L. Ed. 766 (1929), a similar situation arose under Illinois appellate procedure, where the Illinois Supreme Court denied certiorari review to Rock, a railway employee The railway later challenged certiorari jurisdiction because Rock had not thereafter applied to the Illinois intermediate appellate court for a certificate of importance. Under Illinois procedure a state supreme court denial of certiorari was for jurisdictional purposes an affirmance of the result below.[2] This Court held:

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[1]There is some question whether such an order can in any circumstance be reviewed by the Court of Appeals. *See Hunter v. County Clerk of Suffolk County*, 19 N.Y.2d 941, 281 N.Y.S.2d 346, 228 N.E.2d 402 (1967) ("[O]rder denying leave to appeal to the Appellate Division involves a pure question of discretion of the type not reviewable by the Court of Appeals . . . ."); HENRY COHEN & ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 147, at 585 (rev. ed. 1952). Extensive research has found no instance of the Court of Appeals' ever reviewing by any route a case in which an Appellate Division had previously denied leave to appeal to itself from an Appellate Term decision.

[2]The New York Court of Appeals has similarly so held as to the effect of an Appellate Division dismissal of an appeal. *In re Luckenbach*, 303 N.Y. 491, 104 N.E.2d 870 (1952).

> It would be unreasonable to require a defeated party to apply to the judges of the lower court for a certificate of importance and appeal after the Supreme Court had so approved the judgment.
>
> The judgment is reviewable here. "Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach."

279 U.S. at 412, 49 S. Ct. at 363, 73 L. Ed. at 766 (citations omitted). To the same effect see *Chesapeake & Ohio Railway Co. v. Mihas*, 280 U.S. 102, 50 S. Ct. 42, 74 L. Ed. 207 (1929).

So here, it would be unreasonable to require a certain fourth denial of state appellate review[3] prior to attachment of this Court's jurisdiction to issue a writ of certiorari under section 1257.

II. *Denby*'s Misreading of *Fothergill*'s Interpretation of the Warsaw Convention Needs Correction by This Court

The Law Lords in *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251 (H.L. 1980), although they differed on such points as the appropriate weight to be given to various guides to interpretation of a treaty, were all agreed as to the issue before them and its resolution: Whether the term "*avarie*" in art. 26(2)—translated in both the British and American versions as "damage"—should be limited to

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[3] As a matter of law, such a motion cannot now timely be brought, and such untimeliness cannot be waived under state procedural law. CPLR §§ 5513(b), 5514(a), (c).

physical damage alone or should include partial nondelivery of the baggage or goods consigned to the airline. All agreed that the broader meaning was the correct one.

Respondent is groundless and wrong in asserting, therefore (Brief in Opposition at 11) that

> it has always been understood that had Mr. Fothergill taken three suitcases with him on that fateful day, and only two of them were delivered, the total non-delivery of the one suitcase would not be "damage" and thus would not require a seven day notice of claim.

The supposed rule of decision that "Damage is damage and loss is loss"[4] does violence to the established legal meaning of the controlling treaty language. So does the making of a distinction in application of the Convention's provisions based on whether or not one or more whole packages is lost by the airline. Neither the Convention nor the tariff speaks in terms of individual cartons or pieces of luggage, but only in general collective terms such as "*des marchandises*" ("the goods") or "the consignment". The only article of the Convention that gives rise to any consequences arising from goods being shipped in more than one package is art. 7, which gives the carrier the right to require the consignor to execute multiple waybills for multiple packages—but such was not done here. No language in the Convention, therefore, can serve as a ground for distinguishing between a loss by an air carrier of a full carton of goods and a loss of half a carton of goods. Yet just such a distinction was made by the *Denby* court. That distinction was just as impermissibly followed by the decision here below.

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[4] *Schwimmer v. Air France*, 87 Misc. 2d 147, 149, 384 N.Y.S.2d 658, 659 (Civ. Ct. 1976) (cited with approval by *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 186 (2d Cir. 1984)) (and unsuccessfully quoted by losing counsel in *Fothergill*, [1981] A.C. at 264 (argument of counsel)).

Prior to this judicial legislation by the Second Circuit, there was no such "understanding" as respondent alleges. Instead, there has since been only *mis*understanding – misunderstanding which gives the United States an interpretation of a multilateral treaty different from that of the other parties to it. Such misunderstanding can only be corrected by this Court.

III. Affirmance by an Equally Divided Court and Denial of Certiorari Can Constitute No Precedent on the Issue of Prejudgment Interest

Respondent argues (Brief at 14-15) that the three-way conflict between Circuit Courts of Appeal and New York state courts would in effect be resolved by virtue of this Court's denials of certiorari in the present case and in *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959 (1985), or by its affirmance by an equally divided court in *Eastern Air Lines, Inc. v. Mahfoud*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985).

Aside from the fact that such dispositions do not resolve the conflict between the holding below and the Fifth Circuit's decisions relied on by respondent, it is well settled that such dispositions have *absolutely no precedential effect*. *E.g.*, *Brown v. Allen*, 344 U.S. 443, 491, 73 S. Ct. 397, 439, 97 L. Ed. 469, 507 (1953) ("Thirty years ago the Court rather sharply reminded the Bar not to draw strength for lower court opinions from the fact that they were left unreviewed here."); *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361, 364 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."); *Neil v. Biggers*, 409 U.S. 188, 192, 93 S. Ct. 375, 378-79, 34 L. Ed. 2d 401, 407 (1972) ("Nor is an affirmance by an equally divided Court entitled to precedential weight."); *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112, 19 L. Ed. 419, 423 (1868) (affirmance by equally

divided court without opinion "prevents the decision from becoming an authority for other cases of like character").

Therefore, the conflict among the authorities noted below can only be resolved by this Court, and not by any examination of the precedential status quo.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS A. MONTBACH
Counsel of Record

PAUL AMBOS

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14 Wall Street
New York, New York 10005
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May 3, 1995

APPENDIX M

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

January 3, 1995

Bigham Englar Jones & Houston
14 Wall Street, 22nd Floor
New York, New York 10005

Re: Maro Leather Co. v. Aerolineas Argentinas v TWA

Dear Counsel:

The Court has received your 500.2 jurisdictional statement and may examine its subject matter jurisdiction *sua sponte* with respect to whether a substantial constitutional question is directly involved to support an appeal as of right and whether the order appealed from finally determines the action within the meaning of the Constitution.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persevere in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction, including references to the record demonstrating that a constitutional question was raised in the court or other forum of original instance. Also please enclose a copy of each brief filed in the Appellate Division, as well as a copy of the Record on Appeal or Appendix filed in that court. Your adversary is likewise afforded the opportunity to comment in writing on the subject matter jurisdiction.

If this *sua sponte* inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for normal perfecting of the appeal.

Very truly yours,

Donald M. Sheraw
Donald M. Sheraw

DMS:mec
cc: Donovan Parry Walsh & Repetto

APPENDIX N

BIGHAM ENGLAR JONES & HOUSTON
14 Wall Street
New York, New York 10005-2140

January 10, 1995

Re: Maro Leather Co. v. Aerolineas Argentinas v. Trans World Airlines, Inc.
N.Y.C. Civil Ct., N.Y. County Index No. 48027/1985
Appellate Term, 1st Dep't Calendar No. 93-257
Appellate Division, 1st Dep't Calendar No. M-5609
Our File No. 165306-14

Hon. Donald M. Sheraw, Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Dear Sir:

I respond to your January 3, 1995 letter inviting comments upon the Court's *sua sponte* review with respect to its subject-matter jurisdiction of the above-referenced appeal. As requested, I enclose copies of the appellate briefs of both sides below, together with a copy of the Appendix below. In addition, I am copying counsel for respondent as well as the Solicitor General, and as requested in my letter of December 23, 1994, I respectfully request an opportunity to respond to any comments they might offer to the Court on this subject-matter.

The jurisdiction of the Court of Appeals is invoked under CPLR 5601(b), which provides:

> (b) Constitutional Grounds. An appeal may be taken to the court of appeals as of right:
>
> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

Prior to the decision of Appellate Term below, issues other than that of constitutional construction were advanced by appellant; since that decision, the only issue as to which appellate review was sought has been the constitutional one. While subdivision 2 of CPLR 5601(b) may thus be applicable here, appellant invokes subdivision 1 as more clearly applicable. In addition, if this appeal is allowed to proceed to consideration of the merits, appellant intends to obtain review under CPLR 5501(a)(1) of the prior non-final order of the Appellate Division entered herein on December 20, 1988.

Some background on the nature of the case is necessary. Plaintiff's claim is for partial loss of a shipment of air cargo carried by defendant in international common carriage by air from Buenos Aires to New York (Complaint, Appendix, at A-17). Since both Argentina and the United States are parties to the multilateral Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (commonly known as the "Warsaw Convention"), the shipment and the claim are governed by the Convention. Defendant pleaded defenses based, *inter alia*, on Articles 22 and 26 of the Warsaw Convention (Answer, A-19, A-22). Liability was contested from the outset, and at one point in the litigation the action was dismissed for failure to file a timely notice of claim with the defendant, but that dismissal was later reversed by the Appellate Division, and the matter proceeded to trial, resulting in a finding in favor of plaintiff, upon which the judgment now appealed was founded.

Article 22 of the Warsaw Convention provides in pertinent part:

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at

the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

. . .

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

49 Stat. at 3019 (U.S. unofficial translation of French official version). Here the gross weight of the undelivered goods was 1,200 kilograms (Notice to Admit, A-738), and the dollar conversion for the Convention's weight limitation is $20.00 per kilogram (*Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984)). Defendant's "liability", then, must be "limited to" $24,000.00, under the explicit terms of the Warsaw Convention.

The value of the missing goods was determined at trial to be $23,024.90 (A-1224). To this the trial judge added "interest at the statutory rate from February 2, 1984" (*id.*). Section 5001 of the New York State Civil Practice Law and Rules provides, in pertinent part:

§ 5001. Interest to verdict, report or decision.

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

. . .

(c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. . . . The amount of interest

> shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

Similarly, CPLR 5002 provides:

> Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. The amount of interest shall be computed by the clerk of the court and included in the judgment.

Finally, CPLR 5004 provides, during all times relevant to the present action:

> Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.

Applying the foregoing state statutes, judgment was entered for the $23,024.90 principal amount of damages found, plus prejudgment interest totaling $17,790.00, plus costs not here contested of $367.50, for a total of $41,182.40 (A-9). This amount is well in excess of the $24,000.00 to which the explicit terms of the Warsaw Convention, as noted above, stipulate that defendant's liability should be limited.

This conflict brings directly to bear the constitutional provision here invoked by defendant. The Supremacy Clause, article VI, clause 2 of the Constitution of the United States of America, provides in pertinent part:

> . . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding.

The meaning of this clause is that "if a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S. Ct. 258, 263, 15 L. Ed. 2d 194, 201 (1965). The Warsaw Convention has repeatedly been held to be a treaty within the scope of the Supremacy Clause. *E.g. Berner v. United States*, 2 Misc. 2d 260, 149 N.Y.S.2d 335 (Sup. Ct. N.Y. County), *aff'd*, 3 A.D.2d 9, 157

N.Y.S.2d 884 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 1003, 170 N.Y.S.2d 340, 147 N.E.2d 732 (1957); *Wyman v. Pan American Airways*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. N.Y. County 1943), *aff'd*, 267 A.D. 947, 48 N.Y.S.2d 459 (1st Dep't), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882, 65 S. Ct. 1029, 89 L. Ed. 1432 (1945). Nevertheless, the courts below here have instead enforced the state law and not enforced the federal treaty, in direct contravention of the constitutional requirement.

Precedents of the Court of Appeals hold that in such a situation a constitutional question is "directly involved":

> [A]ppeal as of right has been sustained from a decision of the Appellate Division which overrules a claim that a state statute is in conflict with a Federal statute or regulation in violation of the Federal Constitution, though it is first necessary to decide an issue of statutory construction—i.e., whether there is such a conflict—in order to resolve the constitutional issue. In such situations the issue of statutory construction necessarily involves the constitutional issue; and the constitutional issue cannot be obviated, and is in fact resolved, by decision of the issue of conflict.

Henry Cohen & Arthur Karger, The Powers of the New York Court of Appeals § 59, at 268-69 (1952) (footnote omitted) (hereinafter cited as "Cohen & Karger") (citing *Harlem Check Cashing Corp. v. Bell*, 296 N.Y. 15, 68 N.E.2d 854 (1946)).

While it is true that the decision of Appellate Term below does not in terms address the Supremacy Clause, it clearly addresses (albeit incorrectly, appellant contends) its substance:

> In awarding prejudgment interest in excess of the Warsaw Convention's total damages limitation, the trial court relied upon the reasoning of Eli Lilly Argentina, S.A. v. Aerolineas Argentinas, 133 Misc.2d 858, emphasizing the compensatory nature of prejudgment interest under New York law (see, CPLR 5001) and the goal of speedy resolution of cargo loss claims. We affirm.

Decision at ii. (The *Eli Lilly* case held that the doctrine of the "law of the forum" would override the terms of the treaty, 133

Misc. 2d at 861, 508 N.Y.S.2d at 867—a holding clearly inconsistent with the Supremacy Clause. But appellant does not intend to argue the merits of this appeal upon this submission.)

To the extent that the courts below relied upon various Fifth Circuit Court of Appeals cases which allowed prejudgment interest, I must point out for purposes of the present review that this minority holding is specifically limited to cases in federal courts (the interest holding being an issue of federal procedural common law), and that the Fifth Circuit expressly refused in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984), to allow the Louisiana prejudgment interest statute as such to have precedence over the Warsaw Convention. The decisions of the Second and Seventh Circuits noted below are obviously in accord. *Eli Lilly*, however, was contrary and thus presents directly the Supremacy Clause issue.

The application of the Warsaw Convention as a limitation on damages was, as noted above, raised by defendant in its pleadings. Its supremacy over the conflicting provisions of CPLR 5001 and 5002 were noted by Mr. Edward Sadowsky, counsel for defendant, in argument of this very issue in the trial court:

> I ask The Court to pay [*sic*; probably should be "take"] judicial notice of The Warsaw Convention . . . . The United States is a signatory to this Warsaw Convention and this is the supreme law of the land as a treaty of The United States as ratified by the congress and signed by the president. Whether we like it or not, state courts must abide by this precedent . . . .

(Transcript of Trial, A-1221.[1]) This issue was similarly restated in the Brief of Defendant-Appellant Aerolineas Argentinas at Appellate Term, at 31:

> The Warsaw Convention is a multilateral treaty designed to establish uniform rules governing the content of

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1 This passage was in response to the trial judge's query, "By what authority may I say that The Convention doesn't apply?" (A-1219), thus showing clear recognition of a conflict between the treaty and the CPLR.

> documentation and the procedures and limits of liability for international air carriers and their customers for passenger traffic and air cargo. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 390-91, 358 N.Y.S.2d 97, 101, 314 N.E.2d 848, 851 (1974). As a treaty, it is the supreme law of the land, of which New York courts must take notice. *Id.* at 392, 358 N.Y.S.2d at 103, 314 N.E.2d at 852. . . .

The passage in the *Rosman* case last cited to is as follows:

> While the [Warsaw Convention] is written in French, it is nevertheless a domestic, not a foreign law. It is the supreme law of the land (U.S. Const., art. VI, cl. 2) of which New York courts are required to take judicial notice (CPLR 4511, subd. [a] Consol. Laws, c. 8).

All subsequent argument on motion practice has similarly involved direct address of the Supremacy Clause issue. The statement of counsel for respondent (letter of John K. McElligott, Esq., dated December 20, 1994) that "this issue has never been presented to the Court before" is simply inaccurate. Moreover, even if the issue had not been explicitly raised before the court of first instance, it would still be preserved for review. Cohen & Karger, *supra*, § 55, at 252.

Finally, it is clear that the order appealed from, refusing review of a final money judgment for which no further proceedings below were contemplated, satisfies the finality requirement of CPLR 5601(b).

Repeating my earlier request in this letter-submission, appellant respectfully requests a reasonable opportunity to respond to any submissions which may be made by respondent or by the Solicitor General as to the jurisdictional issues here involved.

Respectfully submitted,

Bigham Englar Jones & Houston

by Paul Ambos
Paul Ambos

PA:hs

cc: John K. McElligott, Esq.
Hon. Victoria Graffeo, Solicitor General

APPENDIX O

Donovan Parry Walsh & Repetto
Wall Street Plaza
88 Pine Street
New York, New York 10005-1801

January 16, 1995

VIA EXPRESS MAIL
Honorable Donald M. Sheraw
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Re: Maro Leather Co. v. Aerolineas Argentinas
v. Trans World Airlines, Inc.
Civil Court Index No.: 48027/85
Appellate Term, 1st Dept. Cal. No.: 93-257
Appellate Division, 1st Dept. Cal. No.: M-5609
Our File No.: 12-85-709

Dear Mr. Sheraw:

This office is in receipt of the January 10, 1995 letter from counsel for defendant-appellant with regard to the Court's *sua sponte* review of subject matter jurisdiction. I request the Court's leave to respond briefly to two points made in this letter.

At page 5 of the letter counsel states, "Precedents of the Court of Appeals hold that in such a situation a constitutional question is 'directly involved' ". Counsel offers this authority for the proposition that where there is a conflict in interpretations of a statute the Court of Appeals has ruled that a constitutional question is directly involved. Yet, the Court of Appeals precedents cited by counsel turn out to be only one, and one which does not support appellant's position. In *Matter of Harlem Check Cashing Corp. v. Bell*, 296 N.Y. 15 (1946), at page 16, wherein is recited the appellant's points on appeal, the appellant argued, "Article 1, section 12, of the Constitution of the State of

New York and section 813-a of the New York Code of Criminal Procedure purporting to legalize such interception and disclosure are violative of the Interstate Commerce Clause of the Federal Constitution." It is thus apparent that there was a direct constitutional challenge to the statute in the check cashing case and not simply a question of interpretation. In this case there never has been a constitutional challenge to CPLR 5001 or CPLR 5002.

Additionally, at pages 5 through 6 of the letter, counsel states, "The *Eli Lilly* case held that the doctrine of the 'law of the forum' would override the terms of the treaty . . . a holding clearly inconsistent with the Supremacy Clause." Yet, a review of the *Eli Lilly* case reveals the exact contrary. In *Eli Lilly* the Court stated, "Article 28 of the Warsaw Convention *may be interpreted* to allow the law of the forum on pre-judgment interest", 133 Misc.2d 858, 508 N.Y.Sup. 867. (Emphasis supplied) It is thus evident that in the *Eli Lilly* case the Court did not find that the law of the forum supersedes the Warsaw Convention, but found that if the treaty is silent with regard to a particular issue that the law of the forum, i.e., pre-judgment interest, may be invoked. Clearly, this was a matter of interpretation. Likewise, in this case, respondent's position is not that CPLR 5001 supersedes the Warsaw Convention, but that the Warsaw Convention is silent as to pre-judgment interest and thus pre-judgment interest is allowable. This is not a question directly involved in the construction of the Constitution of the United States, but only a matter of interpretation of the language of a treaty.

Thus, since no direct constitutional challenge has been raised previously, and since the issue of treaty interpretation is not a constitutional issue, plaintiff-respondent does not believe that subject matter jurisdiction lies and respectfully requests that the matter be dismissed.

Thank you for your attention.

Very truly yours,

Donovan Parry Walsh &
Repetto

By: John K. McElligott
John K. McElligott

JKM/vf
cc:
Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005
Attention: Paul Ambos, Esq.

Honorable Victoria Graffeo
Solicitor General
State of New York
Department of Law
The Capitol
Albany, New York 12224

APPENDIX P

Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005-2140

January 18, 1995

Re: Maro Leather Co. v. Aerolineas Argentinas v. Trans World Airlines, Inc.
N.Y.C. Civil Ct., N.Y. County Index No. 48027/1985
Appellate Term, 1st Dep't Calendar No. 93-257
Appellate Division, 1st Dep't Calendar No. M-5609
Our File No. 165306-14

Hon. Donald M. Sheraw
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Dear Sir:

Further to my letter of January 10, 1995, appellant respectfully responds to the letter to you from John K. McElligott, counsel for respondent, dated January 16, 1995, in turn responding to my letter of January 10, 1995.

Respondent is still trying to couch this case as a question of interpretation of treaty language, ignoring the authoritative text on Court of Appeals jurisdiction which points out that while a conflict between state and federal law may well be resolved through interpreting statutory language, this does not mean that the existence of the conflict—the foundation for constitutional-question jurisdiction—is nullified.

Moreover, (although this touches the merits of the appeal) it is no response to claim that the Warsaw Convention is "silent as to pre-judgment interest"; the Convention speaks in terms of "liability", as to which prejudgment interest is an element. While such "interpretation" can perhaps be used to justify inclusion of state-law-derived prejudgment interest as an element of damages

in a Warsaw claim *up to the limitation amount*, it cannot support interest above that amount without running afoul of the Supremacy Clause. *Cf. The Limited Stores, Inc. v. Pan American World Airways, Inc.*, 65 Ohio St. 3d 66, 600 N.E.2d 1027 (1992) (allowing prejudgment interest up to Warsaw limitation amount but not beyond) (applying New York CPLR 5001).

As pointed out in my January 13 letter, this Court has long recognized that it is impermissible to sidestep the plain meaning of a law or treaty "under the guise or pretext of interpretation". It must be equally impermissible to sidestep the Supremacy Clause by the same pretext.

Respectfully submitted,

Bigham Englar Jones & Houston

by Paul Ambos
Paul Ambos

PA:hs
cc: John K. McElligott, Esq.
Hon. Victoria Graffeo, Solicitor General

APPENDIX Q

Donovan Parry Walsh & Repetto
Wall Street Plaza
88 Pine Street
New York, New York 10005-1801

January 12, 1995
VIA OVERNIGHT MAIL

Honorable Donald M. Sheraw
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Re: Maro Leather Co. v. Aerolineas Argentinas
v. Trans World Airlines, Inc.
Civil Court Index No.: 48027/85
Appellate Term, 1st Dept. Cal. No.: 93-257
Appellate Division, 1st Dept. Cal. No.: M-5609
Our File No.: 12-85-709

Dear Sirs:

This office is in receipt of the Court's letter dated January 3, 1995, requesting commentary from the parties with regard to the question of subject matter jurisdiction of the instant appeal pursuant to CPLR 5601(b)1.

This office represents the Plaintiff-Respondent, Maro Leather Co., in the captioned appeal. By prior correspondence to the Clerk's office dated December 20, 1994, we requested the opportunity to respond to such jurisdictional statement when the Court conducts its *sua sponte* review. A copy of our December 20, 1994 letter is attached hereto. As stated in that letter, respondent does not believe that subject matter jurisdiction lies, and thus believe the appeal should be dismissed.

We note that in Appellant's statement pursuant to Rule 500.2 there is still some ambiguity as to what Appellant claims is the issue before the Court which directly involves "the construc-

tion of the Constitution of the state or of the United States", and thus gives the Court jurisdiction under C.P.L.R. § 5601(b)1. Thus, we are at some disadvantage in addressing the issues, but nevertheless shall respond to the Court's inquiry based on the contents of the Rule 500.2 statement.

In paragraph 9 of the Statement Defendant-Appellant "asserts that sections 5001(a) and 5002 of the Civil Practice Laws and Rules, as here applied, are unconstitutional". I have reviewed the Record on Appeal, as well as the brief submitted by Appellant to Appellate Term, and the motion papers submitted to both requests for leave to appeal. I have found nothing in the record before Civil Court, Appellate Term or the Appellate Division where Appellant argued in any way that C.P.L.R. 5501(a) or 5502 were unconstitutional either *in toto* or as applied in this case. If this is appellant's position, it is evident that this issue is being raised for the first time in order to invoke the Court's mandatory jurisdiction under C.P.L.R. 5601(b)1. The Court of Appeals has noted that when a constitutional issue is raised for the first time on appeal (in this case, for the first time on appeal to the Court of Appeals, after the matter has been before two appellate tribunals) the "issue is therefore not preserved for our review and the appeal as right must be dismissed on the ground that no substantial constitutional question is directly involved". *Matter of Shannon B.*, 70 N.Y.2d 458, 462, 522 N.Y. Supp. 2d 488, 490 (1987). Thus, due to the failure of defendant to challenge the constitutionality of the applicable statutes in any previous forum, the issue is not preserved for this Court's review and subject matter jurisdiction does not lie. For the Court's review, we again enclose a copy of the Point headings in appellant's brief at Appellate Term, as well as the Appellate Term decision. As the Court can observe, the constitutionality of the statutes was neither challenged by appellant, nor addressed in Appellate Term's decision.

At paragraph 7 of the Rule 500.2 Statement, Appellant apparently attempts to create a constitutional issue by arguing that the absence of language in the Warsaw Convention regarding pre-judgment interest involves the construction of Article 5,

Clause 2 of the Constitution of the United States, the Supremacy Clause. Yet, the interpretation of provisions of the Warsaw Convention do not create an issue which directly involves the construction of the Constitution of the United States. Interpretation of the Treaty, just like interpretation of any act or [*sic*] Congress, is solely a matter of intention of the drafters of the Treaty and not of the Constitution of the United States. While the Supremacy Clause may make the Warsaw Convention the law of the land with regard to those issues to which the Convention is addressed, questions regarding the interpretation of the Warsaw Convention do not involve the construction of the Constitution of the United States. any more than a question regarding the interpretation of such statutes as the Interstate Commerce Act or the Jones Act, issues frequently addressed in State Courts, would involve construction of the Supremacy Clause. For instance, in *Dalziel v. Oregon-Washington Railroad and Navigation Company*, 248 N.Y. 569 (1928), the Court of Appeals dismissed an appeal from a judgment of the First Department (219 App. Div. 394 (1927)), which had interpreted provisions of the Carmack Amendment to the Interstate Commerce Act. Implicit in the dismissals was the absence of subject matter jurisdiction.

The Court of Appeals has addressed the distinction between an appeal concerning the interpretation of a statute and its constitutionality, and has found that in the former case there is no constitutional issue:

> There is no merit in the appellant's assertion and argument that this proceeding directly involved the construction of the Constitution of the state. He avers that he is held in imprisonment by virtue of a sentence and judgment which the court had not the power to render and, therefore, are void. Whether or not the Court had the power is determinable only through the interpreting of statues. The meaning and not the validity of the statutes is involved. In a certain sense, perhaps, each enforcement of a statute by a Court involves its constitutionality or the construction of the Constitution of the state. That sense, however, was not within the legislative mind or intention in enacting the present restric-

tion of our jurisdiction. *An appeal, upon the ground the Appellant here asserts, must present to us directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States. People Ex Rel Curtis v. Kidney*, 225 N.Y. 299, 304-305 (1919). (Emphasis supplied) See, also, *People ex Rel Ryan v. Lynch*, 262 N.Y. 1, 4 (1933).

Thus, where, as in this case, when all that is involved is the interpretation of the provisions of the Warsaw Convention there is no direct constitutional issue involved such as to permit jurisdiction under C.P.L.R. 5601(b)(1).

Consequently, we respectfully request that the appeal be dismissed, so that plaintiff may enforce a judgment currently amounting to $40,814.90 (with additional interest to be computed), which it has sought to obtain for nine years.

Thank you for your attention.

Very truly yours,

Donovan Parry Walsh &
Repetto

By: John K. McElligott
John K. McElligott

JKM/vf
cc: w/o Encs.
Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005
Attention: Paul Ambos, Esq.

APPENDIX R

Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005-2140

January 13, 1995

Re: Maro Leather Co. v. Aerolineas Argentinas v. Trans World Airlines, Inc.
N.Y.C. Civil Ct., N.Y. County Index No. 48027/1985
Appellate Term, 1st Dep't Calendar No. 93-257
Appellate Division, 1st Dep't Calendar No. M-5609
Our File No. 165306-14

Hon. Donald M. Sheraw
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Dear Sir:

Further to my letter of January 10, 1995, appellant respectfully responds to the letter to you from John K. McElligott, counsel for respondent, dated January 12, 1995, in which he offers comments on behalf of respondent in connection with the Court's *sua sponte* review with respect to jurisdiction of the above-referenced appeal.

Opposing counsel again relies on copies of point headings in briefs and ignores the fact that the argument by appellant in the court of first instance invoked the very language of the Supremacy Clause to insist that the clear language of the Warsaw Convention be given priority over the prejudgment-interest provisions of CPLR 5001 and 5002. That argument was denied by decisions of both the Civil Court and the Appellate Term, each specifically invoking *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc. 2d 858, 861, 508 N.Y.S.2d 865, 867 (N.Y. City Civ. Ct. 1986), a case which held that CPLR prejudgment-interest provisions (as the "law of the forum") take priority over the Warsaw Convention.

This direct violation of the Supremacy Clause thus, as shown by the precedents cited in my January 10 letter, requires the conclusion that the constitutional question is "directly involved".

Hence counsel's citation of *Matter of Shannon B.*, 70 N.Y.2d 458, 522 N.Y.S.2d 488, 517 N.E.2d 203 (1987), is irrelevant. Likewise irrelevant is reliance on such cases as *Dalziel v. Oregon-Washington R.R. & Navigation Co.*, 248 N.Y. 569, 162 N.E. 528 (1928), in which no conflict between a federal statutory or treaty provision and a state law was presented.

Respondent repeatedly tries to characterize this case as not presenting a Supremacy-Clause conflict between a federal treaty and a state statute (although Mr. McElligot's letter of December 20, 1994 appears to concede that this conflict in fact exists), but rather merely a dispute over "statutory construction" of the Warsaw Convention. But this does not solve the problem. The mere fact that statutory construction may be involved in resolving issues does not mean that there is no Supremacy-Clause conflict; on the contrary, in the circumstances of this case the fact of jurisdiction is supported by the existence of this question. As pointed out in my earlier letter,

> appeal as of right has been sustained from a decision of the Appellate Division which overrules a claim that a state statute is in conflict with a Federal statute or regulation in violation of the Federal Constitution, though it is first necessary to decide an issue of statutory construction—i.e., whether there is such a conflict—in order to resolve the constitutional issue. In such situations the issue of statutory construction necessarily involves the constitutional issue; and the constitutional issue cannot be obviated, and is in fact resolved, by decision of the issue of conflict.

Henry Cohen & Arthur Karger, The Powers of the New York Court of Appeals § 59, at 268-69 (1952) (footnote omitted).

The Warsaw Convention is clear: "the liability of the carrier shall be limited to [here, $24,000.00]". It does not state that "liability . . . shall be limited to [$24,000.00] *unless some New York statute provides otherwise*". When the words of a statute or treaty

> have a definite and precise meaning, such meaning cannot be extended or restricted by conjecture, or under the guise or pretext of interpretation. It is not allowable to interpret that which has no need of interpretation.

Mushlitt v. Silverman, 50 N.Y. 360, 361 (1872), *accord Dep't of Welfare v. Siebel*, 6 N.Y.2d 536, 543, 190 N.Y.S.2d 683, 689, 161 N.E.2d 1 (1959); *McCluskey v. Cromwell*, 11 N.Y. 593, 601-02 (1854). To uphold the unsupportable decisions below would itself be a denial of due process, which would also support jurisdiction in the Court of Appeals under the rule of *Valz v. Sheepshead Bay Bungalow Corp.*, 249 N.Y. 122, 163 N.E. 124, *cert. denied*, 278 U.S. 647, 49 S. Ct. 82, 73 L. Ed. 560 (1928). Such convoluted reasoning should not, however, be necessary to support jurisdiction here.

For the foregoing reasons, appellant respectfully submits that this Court has jurisdiction to consider this appeal as of right pursuant to CPLR 5601(b). Should this Court determine, however, that no appeal as of right lies, appellant respectfully requests leave pursuant to CPLR 5520 to request that this Court, in light of the significance of the issues involved, and in the interest of substantial justice under art. 6. § 3 of the N.Y. Constitution, allow leave to appeal by permission.

Repeating my earlier request, appellant respectfully requests a reasonable opportunity to respond to any further submissions which may be made by respondent or by the Solicitor General as to the jurisdictional issues here involved.

Respectfully submitted,

Bigham Englar Jones & Houston

by Paul Ambos
Paul Ambos

PA:hs

cc: John K. McElligott, Esq.
Hon. Victoria Graffeo, Solicitor General